Supreme Court, U.S.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CATHERINE L. TURNER FULK, Administrator of the ESTATE OF LARRY D. TURNER, Deceased, and CATHERINE - TURNER FULK,

Petitioners,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Seventh Circuit Court Of Appeals

---

PETITION FOR WRIT OF CERTIORARI

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35 pp

Questions Presented for Review

The various findings, both legal and factual, by the Court, to support the direction of a verdict in this case against the Petitioners, under the FELA were issues that should have been decided by the jury as factual issues and not by the Court as legal issues.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
STATEMENT OF CASE	3
REASONS FOR GRANTING WRIT	6
ARGUMENT	8
CONCLUSION	17
APPENDIX A	1a-13a
OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS ENTERED APRIL 5, 1994	1a-11a
ORDER OF THE DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED FEBRUARY 5, 1993	12a-13a

TABLE OF AUTHORITIES

CASES:	Page
Fletcher vs. Union Pacific Railroad Co., 621 F2 902, 8th Cir. 1980	6
McGuigan vs. Union Pacific Railroad Company, 277 Pacific 2d 444 Cal. App. 1954	6
Moody vs. Boston and Maine Corporation, 921 F2 1 @ 3, 1st Cir., 1990	5,6
Rogers vs. Missouri Pacific Railway Company, 352 U.S. 500 @ 506, (1957)	7,13-16
Tennant vs. Peoria & Pekin Union Railway Company, 321 U.S. 29 @ 35	7,13
STATUTES:	
Federal Employer's Liability Act, 45 USC 51, et. seq. April 22, 1908 as amended	3
Jurisdiction of District Courts, Federal Question 28 USC 1331, June 25, 1948 as amended	3
RULES OF THE SUPREME COURT:	
Rule 12	2
Rule 13	2

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PETITION FOR WRIT OF CERTIORARI

Catherine L. Turner Fulk, Administrator of the Estate of LARRY D. TURNER, Deceased, and Catherine Turner Fulk, the Petitioners herein, pray that a Writ of Certiorari issue to review the Judgment of the Seventh Circuit Court of Appeals entered in the above-entitled cause on April 5, 1994.

Opinions Below

The opinion and judgment of the Seventh Circuit Court of Appeals is reported at *22 F3 120* (case citation) and is printed in Exhibit A, pages 1-11. The

Decision of the District Court of Central District of Illinois entered on February 5, 1993 is printed in Exhibit A, page 12.

Statement of the Grounds on which Jurisdiction of this Court is Invoked

The judgment and opinion of the Seventh Circuit Court of Appeals was entered on April 5, 1994 (Appendix A, Pages 1-11). The Order of the U.S. District Court for the Central District of Illinois was entered on February 5, 1993 and is found in Appendix A, Page 12. No Petition for Rehearing was filed in the Court of Appeals. The jurisdiction of the Court is invoked under Rules 12 and 13 of the Supreme Court which provide as follows:

Rule 12, Supreme Court Rules:

> "1. The Petitioner's counsel who must be a member of the Bar of this Court shall file with Proof of Service as provided in Rule 29, 40 copies of a printed Petition for Writ of Certiorari which shall comply in all respects with Rule 14 and shall pay the docket fee prescribed by Rule 38."

Rule 13, Supreme Court Rules:

> "A Petition for Writ of Certiorari to review a Judgment in any case, civil or criminal, entered by ... United States Court of Appeals shall be deemed to be filed in time when it is filed with the Clerk of this Court within 90 days after the entry of the Judgment."

The statute involved in this case is the Federal Employer's Liability Act 45 USC 51 et. seq., April 22, 1908, as amended.

Statement of Case

The original jurisdiction of the District Court is based on the existence of a Federal Question (28 USC 1331). The Complaint was filed by the Petitioners based on the Federal Employees Liability Act, 45 USC, Sec. 51 et. seq., April 22, 1908, as amended.

Petitioner states that the opinion of the Court of Appeals accurately sets forth the facts in this case with the exceptions of the reference by the Court of Appeals to what Dr. Dettro speculated he might have told Turner about returning for future medical examination and treatment. It is the position of the Petitioner herein that the things that Dr. Dettro said that he was sure he told him about but couldn't recall telling him or had no record of telling him in his written records because, "he usually did so", is speculation and not facts.

Petitioner's decedent, Larry D. Turner, died while on the job working for the Respondent, The Illinois Central Railroad, on November 19, 1990. He was in his 18th year of service working for the railroad working as a switchman. He had a long history of hypertension and high blood pressure which condition was known by the railroad for many years. His work was physically strenuous causing him to walk many miles per day over a rock ballast which was difficult to walk on. He had to throw many switches per day, some of which required great physical exertion because of their lack of repair and/or maintenance.

The railroad required periodic physical exams. In 1983 after receiving a periodic physical exam by a railroad doctor, Turner was diagnosed as being mildly over-weight and suffering from hypertension. He was then ordered by the railroad to seek private medical treatment and to bring both of these conditions under control and report his improved condition to the railroad. He did seek medical treatment. His conditions for both being mildly over-weight and unacceptably high blood pressure showed improvement to acceptable levels and the railroad was so notified by his doctor. He was then ordered by the railroad to continue submitting himself to his private doctor for monitoring of his high blood pressure without the necessity of making reports to the railroad.

The next and last time he was examined by a railroad doctor was on 9/29/89 when he was examined by Dr. Dettro who was also Turner's private doctor. Dr. Dettro reported to the railroad as a result of that exam, "Turner's hypertension was under poor control", but certified he was physically able to work "various jobs". He testified that he thought Turner's job was a brakeman which involved only low to medium physical exertion. Dettro further testified he would not have approved Turner for continued service with the railroad if he had known he was working as a switchman which required strenuous physical exertion on Turner's part. Dettro's medical record on Turner showed that Turner was to come back in 60 days for a check-up. Dettro testified he told Turner to return for a check-up in 60 days.

Although Dettro speculated that he had probably told Turner of the seriousness of his condition and the need to return for periodic check-ups, he could

not recall specifically telling him that nor did his records show that Turner was so admonished by Dettro. Dettro speculated "I probably did tell him that," and later said: "I'm sure I did. I don't specifically recall that, but I'm sure I did."

Turner never returned in 60 days to see Dr. Dettro or ever. Nor did Turner ever see any other doctor from 9/29/89 to the date of his death on 11/19/1990. Dettro never notified Turner to return after Turner failed to return in 60 days nor did his secretarial staff contact him (Turner), although his office had a system whereby the secretarial staff would notify the patient if the patient failed to appear.

Dettro never notified the railroad of his misunderstanding of the type of job being performed by Turner or the need for periodic check-up of Turner's hypertensive condition as a result of the exam of 9/29/89.

The railroad never notified Turner to report back to his private doctor for treatment and monitoring of his hypertensive condition as it did in 1983. Turner never returned to Dettro or any other doctor until he died on the job from a ventricular arrythmia on November 19, 1990. The ventricular arrythmia resulted from congestive heart failure which could have been caused by a worsening of Turner's hypertensive condition, which condition of congestive heart failure probably arose a few weeks or a month before his death and might have been diagnosed and treated if Turner had been receiving periodic exams as to his hypertensive condition.

The Trial Court citing the *Moody v. Boston & Maine Corporation,* case 921 F2d 1 @ 3 directed a verdict

against the Petitioner as to paragraph 12(d) of the Amended Complaint which provided:

> "The Defendant, with the knowledge of Decedent's high blood pressure and hypertension, should have had him examined medically more frequently with more detailed medical examination to determine his physical ability to perform his switchmen's job without danger to his life."

The Court of Appeals, following the Moody decision found there was no duty under the facts of this case for the Defendant railroad to order a physical exam dealing with the review or monitoring of the Defendant's hypertensive condition after it sent him back to work on 9/29/89, and affirmed the action of the Trial Court in directing a verdict as to paragraph 12(d) of the Amended Complaint against the Petitioner herein. No Petition for rehearing was filed by the Petitioner. The Court of Appeals' judgment or opinion was filed on April 5, 1994. This Petition for Writ of Certiorari followed within 90 days after April 5, 1994.

Reasons for Granting Writ

The three cases that are primarily involved in this appeal are *Moody vs. Boston & Main Corporation,* 921 F2d 1 @ 3 1st Cir. 1990. The second case being *Flether vs. Union Pacific Railroad Company,* 621 Fed'l. 2d 902, 8th Cir. 1980. Certiorari denied. 449 U.S. 1110, 1981, and *McGuigan vs. Union Pacific Railroad Company,* 277 Pacific 2d 444, Cal. App. 1954.

We submit that the rule originally announced in the Moody case, recognized and distinguished in the

Fletcher case and also the McGuigan case deals with what duty, if any, the railroad owes to its employees under the FELA in regard to physical examinations made by its doctors.

We submit that this question has never been ruled on by this Court and for this reason alone we submit that this Court should grant the Petition for Writ of Certiorari in this case.

We submit that this Court in the cases where it has made landmark decisions about the function of the Court and a jury in an FELA case are the cases of *Tennant vs. Peoria & Pekin Union Railway Company,* 321 U.S. 29 (1944) and *Rogers vs. Missouri Pacific Railway Company,* 352 U.S. 500 @ 506 (1957). Under those cases, it is clear that most of the issues in an FELA case must be decided by the jury. We submit that the action of the Court of Appeals and the District Court in this case has effectively denied Plaintiff her right to trial by jury on the issue of whether or not the railroad was negligent in failing to perform additional monitoring or exams on the Defendant under the facts in this case.

We submit that it was error to deny the jury the right to decide if the failure to give those monitoring-type exams by the Defendant railroad to the decedent under the facts of this case was negligence. We submit that this should not have been decided on a question of duty or as a matter of law, as the Court of Appeals did, but rather that issue should have been decided by the jury.

We submit that the action of the Trial court and the Court of Appeals in directing a verdict in this case is contrary to this Court's holdings in the Ten-

nant and Rogers cases and for this second reason, this Court should grant the Writ of Certiorari to the Petitioners.

Argument

On page 3 of the opinion the Court said, "Dr. Dettro was certain that he communicated to Turner the seriousness of his condition and the need to continue taking his medication and schedule periodic check-ups.

The Court, in it's opinion, uses that legal conclusion to support it's decision to show that the Plaintiff failed to come under the rules announced in the *Fletcher* and *McGuigan* cases. The rule in those cases are that under the FELA, the Defendant railroad has the duty to assign employees for work for which they are reasonably suited and a duty not to perform physical examinations negligently. The Court of Appeals goes on to explain the rule that McGuigan stands for is the proposition that in certain circumstances where the employer knew that the decedent was in such poor physical condition as not to be able to handle the job of herder without danger to his health *and the decedent was ignorant of these limitations,* the railroad does have a duty to medically examine. The previous finding that Dr. Dettro communicated to Turner the seriousness of his condition and the need to continue taking his medication and schedule periodic check-ups is all speculation. On TR-215, the following question was asked: "Q. Did you ever tell Larry Turner that if he failed to have his hypertension monitored, if he engaged in stressful and strenuous physical activity on the job, his blood pressure might go up, which might cause him to have various attacks that you told us about which might or could

be fatal to him? A. I probably did. Q. Do you specifically recall that? A. No, I don't. Q. And your records don't show that you told him, is that correct? A. I don't believe so."

Also at TR-230, Attorney for the railroad asked: "Q. When you asked Mr. Turner to return within the 60 day period, during the last time that you saw him did you communicate to him the seriousness of that need for him to return to medical contact? A. I am sure I did. I don't specifically recall that, but I am sure I did."

We submit that the entire line of questioning was based upon what Dr. Dettro, "was sure that he did," nothing that he specifically recalled saying, nothing that he wrote in his record suggests that he normally did that, that is, to tell the patient about the seriousness of his condition. The Court of Appeals says at page 10 of the opinion, "that the attempt by Turner's widow to prove that Turner did not hear or understand what Dettro said because Turner failed to mention a check-up to her after the September 29th exam, "without further support we find these submissions too speculative to impeach Dr. Dettro's testimony and the natural conclusions that flow from it." We submit that Dr. Dettro's testimony was indeed only speculation and in this particular situation, the inferences to be drawn from that speculation should have been made by the jury as well as the inferences to be drawn from the evidence of Turner's widow and the action of the Court in ruling as a matter of law that in the one instance the speculative evidence was solid evidence and the other instance it was not, invades the province of the jury and denies the Plaintiff the rights given to her under the FELA

by the United States Congress to have a jury decide her case.

The fact that Turner didn't show up for the exam 60 days after Dettro's examination for the Railroad on 9/29/89 is some evidence that Dettro did not tell him to return in 60 days or explain the seriousness of this return to his health and life or Turner didn't hear or didn't understand him. A jury could have drawn one or more of these inferences from that fact.

The fact that Dettro's office failed to notify Turner to come in for his 60-day check-up after he failed to show up for the same is some evidence that Dettro never explained the seriousness of his condition to him and the need to return for periodic check-ups (see TR-214 and 215 of the Record). "Q. After Larry Turner failed to show up 60 days after your examination of 9/29/89, did you ever attempt to contact him and get him to come back and seek monitoring for his hypertension? (TR-215) A. I don't recall doing that. There were some monitors in the office that were supposed to kick in from the secretarial staff but I don't know if he was ever contacted."

We submit that this fact that Dettro never contacted Turner nor did his secretarial staff could give rise to an inference to be drawn by the jury therefrom that he, Dettro, never communicated the need to return in 60 days or the seriousness of his need to return in 60 days. A jury could have reasoned that if Dettro thought that Turner's hypertensive condition and the need to have it monitored was as important to Turner's health that Dettro testified it was, then Dettro, when Turner failed to show up 60 days later, he would have attempted to contact him to get him to come back in for a check-up.

This inference is especially compelling when you consider his secretarial staff was supposed to pick up the check-up date and notify Turner to come in if he failed to keep the appointment, but in this case failed to do so.

A jury could draw an inference from that that: (a) Dettro really didn't think it was that serious nor was the 60 day check-up that critical, because; (b) if he did believe that, he would have made sure that the secretarial staff had the date on their diary, and that they acted by notifying him to come back in after the 60 day period.

A jury could have inferred from all this that Dettro did not believe the check-up was so critical to Turner's health and by not so believing, he did not adequately warn Turner of the seriousness of his condition and the seriousness of his need for the check-up.

The drawing of this inference under the FELA belonged to the jury and not to the Court. However, the Court denied the jury the right to draw that inference and ruled as a matter of law that he, Turner, understood he was to return in 60 days and understood how serious it was to his life and health to return for a check-up or monitoring in 60 days. We submit this inference should have been drawn by the jury, and not the Court, this denying the Plaintiff her right to trial by jury granted to her under the FELA.

The Railroad failed to tell Turner that he shouldn't be working the job that he was working at the time he died in his health conditions as shown in the exam of 1989 by Dr. Dettro, because it was dangerous to

his health and life. How do we know that? Because Dettro, by his own admission, didn't know that Turner's job, the one he was working on in 1989, called for heavy physical exertion until sometime after the date of the exam on 9/29/89, the last time he saw him or talked to him. Again by his own admission, had he known, he would not have continued him in that job. Dettro couldn't have warned Turner of that fact because he wasn't aware of it on 9/29/89 and not being warned of that fact, the Railroad owned him a duty to keep examining him, monitoring him, to make sure his condition didn't worsen.

The negligence of the Railroad in connection with Dettro's exam of 9/29/89 was not in the manner that Dettro performed the exam. It was in failing to find out the type of physical exertion his job entailed and upon determining that, removing him from service in that job. We submit that a jury could have drawn an inference from that negligent act of the Railroad, that thereupon it became the duty of the Railroad under the FELA to keep examining and monitoring him to make sure his condition didn't worsen, as part of its duty to furnish him a safe place to work.

As to the prior monitoring of Turner's condition by the Railroad in 1983 when the same condition of hypertension was revealed by virtue of a physical exam given him by the Railroad in that year, the Court of Appeals found that this did not give rise to the duty to monitor his condition after the 1989 exam as a matter of law. We submit, that this question should have been decided by the jury. The Court's action in deciding this question as a matter of law denies Turner's right to a jury trial granted to her under the FELA by the United States Congress.

In the *Tennant vs. Peoria Parkway Railway Company* case, 321, US 29 @ 35, 1944, this Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade,* 136 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co., supra,* 68; *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the *Rogers vs. Missouri Pacific Railroad Company* case, 352 US 500 @ 506, this Court said:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is

narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence. (Emphasis added).

The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and

whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employees claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap.

Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. Similarly, once certiorari is granted, the

> fact that the case arises under the Federal Employers' Liability Act cannot in any way justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case.
>
> The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

We submit that the Court of Appeals in it's opinion has violated both the spirit and the word of both the Tennant and Rogers decisions cited above. The Defendant railroad did play, through its examining doctor, some part in the death of the decedent, and

the issue directed out by the Trial Court should have been submitted to the jury.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 93-1404

CATHERINE L. TURNER FULK, ADMINISTRATOR OF THE ESTATE OF LARRY D. TURNER, DECEASED, and CATHERINE TURNER FULK,

Plaintiffs-Appellants,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 91 C 3128—Richard Mills, *Judge.*

ARGUED NOVEMBER 29, 1993—DECIDED APRIL 5, 1994

Before BAUER and FLAUM, *Circuit Judges*, and ROSZKOWSKI, *District Judge.**

FLAUM, *Circuit Judge.* Catherine Turner Fulk ("Fulk") filed a claim for damages against the Illinois Central Railroad Company ("Illinois Central") under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*. Fulk alleged that various acts of negligence by Illinois Central caused the death of her late husband, Larry D.

* The Honorable Stanley J. Roszkowski of the Northern District of Illinois, sitting by designation.

Turner ("Turner"). In particular, Fulk's Amended Complaint raised four separate charges of negligence.[1] The

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[1] Paragraph 12 of the Amended Complaint reads as follows:

12. The death of the decedent was directly and proximately caused by the negligence of the Defendant in the following particulars:

(a) Defendant provided decedent with an unsafe place in which to work.

(b) Defendant, through a medical doctor hired by Defendant to examine the decedent, had knowledge that the decedent was suffering from high blood pressure and hypertension and knew that he was and could be in danger of a ventricular arrhythmia attack in the event of physical stress brought on by working long hours over a long period of time and/or insufficient help and/or having to exert great physical force to throw the switches. That even though the Defendant, its agents, servants, employees and the doctors Defendant hired to examine the decedent had knowledge of this fact, nevertheless it negligently caused the decedent to suffer physical stress by requiring him to work more than an 8-hour shift for an unbroken string of three days prior to his death on November 19, 1990, by failing to provide a third man for his switching crew as aforesaid, and by causing him to use great physical strength in order to throw the switches in his job as aforesaid.

(c) That the Defendant had knowledge of decedent's hypertension and high blood pressure and knew or should have known he was suffering from heart disease and had a duty to assign decedent to work for which he was reasonably well-suited; which duty it breached by negligently assigning decedent to perform work as a member of a yard switching crew, the performance of which was dangerous to his health and his life because of his hypertension and high blood pressure, and heart disease.

(d) The Defendant, with knowledge of decedent's high blood pressure and hypertension, should have had him examined medically more frequently with more detailed medical examinations to determine his physical ability to perform his switchman's job without danger to his life.

case went to trial on December 17, 1992, bifurcated as to the issues of liability and damages. At the close of evidence, the district court allowed in part and denied in part Illinois Central's Motion for Judgment as a Matter of Law. Fed. R. Civ. P. 50(a). Specifically, the court granted judgment on paragraph 12(d) of the Amended Complaint. Thereafter, the jury returned a verdict in favor of Illinois Central on the three remaining issues. Following the court's entry of judgment for Illinois Central, Fulk timely filed a Motion for New Trial, Fed. R. Civ. P. 59, which the court denied in a brief order entered on February 5, 1993. Fulk appeals from this order. We affirm.

I.

In their briefs, both parties presented encyclopedic recitals of the facts adduced at trial. We reproduce here only those facts necessary to set the context and decide the issue before us.

At the time of his death on November 19, 1990, Larry Turner had been employed as a switchman for the Illinois Central Railroad for almost twenty years. As a switchman, Turner's daily routine required him to walk several miles a day over rock ballast and to throw perhaps as many as fifty switches, some of which were difficult to throw because of their age or state of disrepair. In short, his job often involved long hours and strenuous work.

Turner's medical records indicate that he suffered from high blood pressure throughout his career. Periodic physical examinations from 1972 through 1982 revealed a few temporarily disabling ailments, but Turner's blood pressure apparently was under control as it never caused him to be disqualified from work. On July 25, 1983, however, Dr. J.R. Mallory examined Turner on behalf of Illinois Central and found him to be "moderately over-weight and hypertensive." Dr. Mallory notified Illinois Central that Turner could be continued in service, but required Turner to submit a status report in two weeks regarding his weight and blood pressure. Illinois Central then sent a letter re-

flecting Dr. Mallory's directive to Turner. Just over a month later, Turner was re-examined by Dr. Mallory (this time as Turner's private physician) who found improvement in Turner's blood pressure and weight. Dr. Mallory prescribed medication and requested another status report in six months. Once again, Dr. Mallory transmitted his findings to Illinois Central, which, in turn, sent a letter to Turner imparting the doctor's orders. After the six month interval had passed, Dr. Mallory examined Turner and reported to Illinois Central that Turner's hypertension and weight were under satisfactory control. The doctor told Turner that he should continue follow-up with a private doctor, but no longer required status reports. Illinois Central again sent Turner a letter memorializing Dr. Mallory's findings.

From 1986 to 1988, Turner visited various doctors for treatment of assorted ailments, including high blood pressure. As of May 4, 1988, it appears that Turner had settled on Dr. Mark Dettro as his private physician. In that capacity, Dr. Dettro examined Turner on several occasions and prescribed Lopressor to treat Turner's hypertension. On September 25, 1989, Turner submitted to Illinois Central a request for a periodic examination, and was examined four days later by Dr. Dettro. In his report, Dr. Dettro stated that Turner's hypertension was under "poor control," but nevertheless certified that Turner was physically able to work "various jobs." In addition, Dr. Dettro told Turner to return (as a private patient) in sixty days for a check-up. On October 11, 1989, Illinois Central's medical officer notified Turner's employing officer that Turner was physically qualified as a *brakeman*. Dr. Dettro's report to Illinois Central makes no mention of follow-up examinations and the record indicates no further communications by Illinois Central to Turner with respect to Dr. Dettro's report or recommendations.

At trial, Dr. Dettro testified that he, in fact, believed he was examining Turner for work as a brakeman, a job which he understood to require "low to medium physical exertion." Dr. Dettro further testified that, in view of

Turner's high blood pressure, he would not have approved Turner for continued service if he had appreciated the distinction between a brakeman and a switchman. Dr. Dettro was certain that he communicated to Turner the seriousness of his condition and the need to continue taking his medication and schedule periodic check-ups. Dr. Dettro also testified that Turner failed to schedule a return visit within sixty days, or at any time prior to his death. After Turner neglected to appear as requested, Dr. Dettro did not attempt to contact Turner. Further, the record discloses no evidence of Turner visiting any doctors after his September 29, 1989, examination.

On November 19, 1990, Turner suffered a fatal ventricular arrhythmia while on the job. At trial, Dr. Stuart Frank, a cardiologist, testified for Fulk. According to Dr. Frank, an autopsy of Turner showed evidence of congestive heart failure that had been present for "weeks, months, or even longer, possibly." In Dr. Frank's opinion, this condition could have been diagnosed if Turner had been seen by a physician "certainly in the few days or few weeks prior to his death." Dr. Frank believed that Turner should have been examined frequently enough to ascertain whether his blood pressure was under control, but Dr. Frank could not say precisely how often. If Turner's blood pressure had been treated regularly, and if he had lost weight and stopped smoking, Dr. Frank testified that Turner probably would have lived out the normal life expectancy for a man his age.

Although Dr. Frank testified that the autopsy report showing excessive heart weight revealed a "gross discrepancy" with Dr. Dettro's clinical finding of a normal heart size, Dr. Frank had no criticism of Dr. Dettro's September 1989 examination of Turner. Dr. Frank testified that while Dr. Dettro's examination could not have determined the size of the heart, it could have determined whether Turner had congestive heart failure at that time.

Dr. Gerry Smyth, a cardiologist, testified as an expert for Illinois Central. It was Dr. Smyth's opinion that Turner

could not have been in congestive heart failure at the time of Dr. Dettro's examination. In Dr. Smyth's view, Turner's congestive heart failure and heart disease could not have been discovered unless Turner had submitted to an examination within a month or so of his death. Thus, Dr. Smyth did not believe that Turner's death would have been avoided even if Illinois Central had required regular examinations as frequently as every six months "unless the examination happened to have just occurred within a month prior to his death."

II.

Fulk contends that she is entitled to a new trial because the district court erred in granting judgment as a matter of law to Illinois Central on the allegations raised in paragraph 12(d) of her Amended Complaint. We review a district court's decision to grant judgment as a matter of law *de novo*. *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 884 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2994 (1993); *Warrington v. Elgin, Joliet & Eastern Ry. Co.*, 901 F.2d 88, 89 (7th Cir. 1990). Viewing the evidence in the light most favorable to the non-moving party, we must ascertain whether there is any evidence upon which a jury could reach a verdict for the party producing it, upon whom the onus of proof is imposed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Warrington*, 901 F.2d at 89-90.

We are, of course, mindful that Fulk's case arises under the FELA, a broad remedial statute that is to be construed liberally in order to effectuate its purposes. *Kulavic v. Chicago & Illinois Midland Ry. Co.*, 1 F.3d 507, 512 (7th Cir. 1993). As we recently noted, the FELA "provides railroad workers not only with substantive protection against negligent conduct by the railroad, but also affords an injured worker a remedy suited to his needs, untrammeled by many traditional defenses against tort liability." *Id.* (citing *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 565 (1987)). Hence, it is not surprising that the quantum of

evidence necessary to establish liability under the FELA is lower than that required in an ordinary negligence action. *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 131-132 (7th Cir. 1990) (noting examples of FELA actions that were submitted to a jury based upon "evidence scarcely more substantial than pigeon bone broth"). The test of a jury case under the FELA "is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury . . . for which damages are sought." *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506 (1957) (emphasis added). Thus, the FELA creates a lenient standard for plaintiffs seeking to avoid judgment as a matter of law. Nevertheless, because the FELA is not a strict liability statute, plaintiffs still must prove the traditional common law elements of negligence, including foreseeability, duty, breach, and causation. *Moody v. Boston and Maine Corp.*, 921 F.2d 1, 3 (1st Cir. 1990); *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987).

The district court granted Illinois Central's Rule 50(a) motion only as to paragraph 12(d), which read as follows:

> The Defendant with knowledge of decedent's high blood pressure and hypertension should have had him examined more frequently with more detailed examinations to determine his physical ability to perform his switchman's job without danger to his life.

Relying on a recent First Circuit case, *Moody v. Boston and Maine Corporation*, the Court declined to submit paragraph 12(d) to the jury because the FELA imposes no duty on a railroad to perform periodic physical examinations on its employees. 921 F.2d at 3. Additionally, the court noted that employer liability attaches under the FELA only if, having undertaken to give examinations, the employer performs them negligently. Thus, finding no duty to examine and no direct evidence of negligence in the examinations given by Illinois Central, the court granted judgment as a matter of law on paragraph 12(d).

Fulk maintains that Dr. Dettro's September 29, 1989, examination of Turner may have imposed on Illinois Central various duties. In support of this argument, Fulk first attempts to distinguish *Moody* on its facts. Fulk asserts that *Moody* is inapposite here because there were no prior physical examinations performed on the decedent in *Moody* and the railroad knew little, if anything, of the decedent's deteriorating physical condition. Then, drawing on *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), and *McGuigan v. Union Pacific R.R. Co.*, 277 P.2d 444 (Cal.App. 1954), Fulk submits that Dr. Dettro's September 1989 examination gave rise to several duties on the part of Illinois Central: (1) to perform the examination without negligence;[2] (2) to follow up and monitor a life-threatening condition; and (3) to remove Turner from service if medically necessary. In light of these duties, Fulk argues that "[a]s a matter of law, the jury should have the right (a) to determine whether a duty existed under facts under the law; and, (b) whether Defendant breached that duty." Br. at 22. Accordingly, she contends that the district court improperly invaded the province of the jury by granting Illinois Central's Rule 50(a) motion.

We disagree. First, we note the division of labor between judge and jury in a tort case based on a negligence theory. "Duty is an essential element of negligence," *Homer v. Pabst Brewing Co.*, 806 F.2d 119, 121 (7th Cir. 1986), and "[t]he determination of any question of duty—that is, whether the law imposed upon the defendant the obligation to protect the plaintiff against the consequences which occurred—is a question of law, and is not for the jury." *Gonzales v. Volvo of America Corp.*, 752 F.2d 295, 300 (7th Cir. 1985) (finding that the trial court should have granted defendant's motion for directed verdict on the

[2] As noted above, the district court acknowledged this duty and concluded that Fulk had failed to present any direct evidence of negligence on the examinations given by Illinois Central.

basis that defendant had no duty to warn). Thus, while a jury does indeed determine whether a defendant has breached a duty, the question of whether a duty exists in the first place remains with the court.

We now turn to whether the district court erred in entering judgment as a matter of law on the basis that Illinois Central owed Turner no duty of the kind alleged in paragraph 12(d) of the Amended Complaint. As noted above, Fulk calls our attention to *Fletcher* and *McGuigan* in support of her contention that the court did so err. Like *Moody*, *Fletcher* expressly states that a railroad has no general duty to ascertain whether an employee is physically fit for his job. 621 F.2d at 909. At the same time, *Fletcher* does identify various duties under the FELA, including a duty to assign employees to work for which they are reasonably suited and a duty not to perform physical examinations negligently.[3] *Id.* *McGuigan* stands for the proposition that in certain circumstances—where "the employer knew that [decedent] was in such poor physical condition as not to be able to handle the job of herder without danger to his health, *and the decedent was ignorant of these limitations*,"—a railroad does have a duty to examine. 277 P.2d at 454 (emphasis supplied). Fulk has not identified, nor have we found, any additional cases on point.

We are not persuaded by Fulk's argument that *Fletcher* and *McGuigan* compel a different result in this case. Fulk presented no evidence from any physician establishing that Dr. Dettro negligently performed his September 29, 1989, examination of Turner, and, in fact, Fulk's medical expert, Dr. Frank, conceded on cross-examination that he had no criticism of Dr. Dettro's examination. *Fletcher* and *McGuigan* are relevant to this case insofar as they establish that once an employer undertakes to provide medical

[3] We think it clear that Dr. Dettro was an agent of Illinois Central with respect to the September 29, 1989, examination of Turner in that the examination was ordered by Illinois Central. *Cf. Fletcher*, 621 F.2d at 909 nn. 9-10.

attention it must do so in a non-negligent manner. While this general duty to provide competent medical care may include, in an appropriate case, a specific duty to *advise* an examinee that further medical supervision is necessary for his well-being, it has never been thought to require that an employer *compel* a competent adult patient to submit to further treatments or examination. Nor should it. Fulk submits that Turner may have ignored his doctor's advice and decided to await orders from his direct employer before proceeding with any further treatment. That is his prerogative, but *requiring* an employer to oversee an employee's compliance with doctor's orders is too paternalistic a mandate for a court to impose, even under the liberal strictures of the FELA. We emphasize that this is not a case where an employer at all interfered with an employee's doctor-patient relationship; here, rather, the employee independently expected his employer's direction at every turn. This he may do, but, having done so, we hold that he cannot blame Illinois Central for the result.

In reaching this conclusion, we have assumed that Turner made this choice. As Dr. Dettro testified, Turner "was told in the office notes he was supposed to come back in" for an appointment within sixty days. In her appellate brief, Fulk alludes to Turner's possible ignorance by hypothesizing that a jury could find that Turner did not hear Dr. Dettro tell him to return in sixty days, or that if Turner did hear Dr. Dettro, he did not understand the directive. Fulk supports her theory by offering her own testimony that Turner failed to mention a check-up to her after the September 29 exam. Without any further support, we find these submissions too speculative to impeach Dr. Dettro's testimony and the natural conclusions that flow from it. *See Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1944).

Finally, we consider Fulk's argument that Illinois Central's continued monitoring of Turner's condition pursuant to Dr. Mallory's orders following the 1983 examination gave rise to a duty to follow a similar monitoring regimen following Dr. Dettro's 1989 examination. This "estoppel"

theory sounds in contract, not in tort, and while we may think that undertaking such a monitoring practice might be enlightened self-interest on the part of a business, at least to the extent that healthy employees are productive employees, we cannot agree that prior monitoring gives rise to a legal duty of the kind claimed by Fulk.

III.

Paragraph 12(d) of Fulk's Amended Complaint simply alleged that Illinois Central should have examined Turner more frequently and in more detail. We have examined the few cases that address the scope of a railroad's duty to examine its employees and we conclude that the FELA imposes no such duty on Illinois Central. We hold therefore that the district court properly granted judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a).[4] Furthermore, we find that the exclusion of paragraph 12(d) did not prevent the jury from making the connection between Turner's death and Illinois Central's alleged negligence as to paragraphs 12(a), (b), and (c). Fulk received a fair trial and the district court properly denied her motion for a new trial under Fed. R. Civ. P. 59. Accordingly, the judgment and order of the district court are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[4] Because we decide that the FELA imposed no duty on Illinois Central to examine Turner more frequently and in more detail, we need not reach Illinois Central's argument that Fulk failed to present evidence that the failure to monitor proximately caused Turner's death.

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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS–
SPRINGFIELD DIVISION

No. 91-3128

CATHERINE TURNER FULK, et al.,
Plaintiffs,

v.

ILLINOIS CENTRAL RAILROAD CO.,
Defendant.

FILED

FEB 5 1993

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's motion for a new trial under Fed. R. Civ. P. 59.

Plaintiff contends that the Court erred when it allowed Defendant's motion for a directed verdict regarding Paragraph 12(d) of Plaintiff's complaint. The Court stands by its earlier decision allowing the directed verdict based on the decision in *Moody v. Boston and Maine Corporation*, 921 F.2d 1 (1st Cir. 1990). Plaintiff did not present any evidence that Mr. Turner's medical examination was negligently performed. In fact, Dr. Dettro told Mr. Turner to return for an exam within 60 days. Plaintiff did not pres-

ent any evidence that Mr. Turner's failure to return for a second exam was the result of Dr. Dettro's negligence. Accordingly, the Court must deny Plaintiff's motion.

Ergo, Plaintiff's motion for a new trial (d/e 44) is DENIED.

ENTER: 4 Feb. , 1993

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District
Judge